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in the

Supreme Court

of the

United States

October Term, 1981

THE STATE OF FLORIDA,

Petitioner,

vs.

WILLIE ALLEN GARRETT,

Respondent.

On Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THAT PARTICULAR HOLDING OF *JACKSON V. INDIANA*, 406 U.S. 715 (1972), LIMITING THE LENGTH OF PRE-TRIAL DETENTION OF A LEGALLY INCOMPETENT DEFENDANT PURSUANT TO A PENDING CRIMINAL CHARGE, CAN VOID A FINAL JUDGMENT OF CONVICTION FOR FIRST-DEGREE MURDER ENTERED FOLLOWING A PLEA OF GUILTY, WHERE THAT DEFENDANT EVENTUALLY COULD BE LEGALLY COMPETENT ONLY BY MEANS OF PSYCHOTROPIC MEDICATION, WAS ADJUDICATED LEGALLY COMPETENT TO STAND TRIAL AFTER SEVEN YEARS FROM THE DATE OF HIS ARREST, WAS AT ALL TIMES CIVILLY COMMITTABLE AND WAS NOT SHOWN TO BE PREJUDICED IN HIS ABILITY TO DEFEND AS A RESULT OF THE LENGTH OF THE DELAY?

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OPINION BELOW

The opinion to be reviewed is reported as *Garrett v. State*, 390 So.2d 95 (Fla. 3d DCA 1980).

JURISDICTIONAL STATEMENT

The opinion of the District Court of Appeal of Florida, Third District was entered on November 4, 1980. (App. 1). Rehearing was denied by that court on December 8, 1980 (App. 5). The Supreme Court of Florida declined jurisdiction on April 10, 1981. (App. 6). Justice Lewis F. Powell, Jr. entered an order extending the time for filing this petition on June 2, 1981 and extended the time for filing to July 9, 1981.

This Court's jurisdiction is invoked pursuant to 28 United States Code Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, Section 1 of the Constitution of the United States provides that:

> ***[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE*

On July 7, 1970, Defendant Garrett was indicted for a first-degree murder committed on May 23, 1970. On October 7, 1970, Defendant Garrett and two other persons were charged with a second-degree arson, also committed on May 23, 1970. (R. 1-1 [A]; 129-129 [A]). Garrett faced maximum sentences of death and ten years respectively.

The arson, consisting of firebombing of a bar, occurred at approximately 12:00 A.M. Shots had been fired. The homicide consisted of the shooting of a police officer approximately three hours later and four blocks away. The Defendant was arrested on the same day that both crimes were committed. (R. 1, 73; SR. 8).

Attorney Louis Beller, who had represented the Defendant at an earlier preliminary hearing, was formally appointed to represent Garrett on July 9, 1970, following an oral colloquy with the Defendant, himself. When the court attempted to arraign the Defendant on the homicide charge, his attorney stated both that the Defendant mentioned that he had hallucinations and that the Defendant either attempted suicide or had cut his wrist. This attorney also stated that he uncovered a previous commitment to a mental institution in Texas. Attorney

*The record on appeal will be referred to by the symbol "R". That portion of the record on appeal bound and designated as the transcript of proceedings will be referred to by the symbol "TR". The supplemental record on appeal will be referred to by the symbol "SR". Pleadings filed directly in the lower appellate court subsequent to the filing of the record on appeal will be mentioned without a record citation, because none exists. The appendix to this petition will be referred to by the symbol "App".

Beller pled the Defendant not guilty and not guilty by reason of insanity. The defense then requested appointment of psychiatrists to examine the Defendant. The State requested a speedy trial in the interest of justice. Defense counsel objected, based on the need to assess Garrett's competency to stand trial and defense counsel's belief that Garrett "may be too insane to cooperate with counsel." The trial judge stated that he was going to give the Defendant a speedy trial, but put off setting a trial date until after a competency hearing. (R. 63-75).

Pursuant to a court order, a psychiatrist, Dr. Mutter, evaluated the Defendant. His written report revealed the following: Conversation with the Defendant revealed prior violent behavior, shock treatment, and a four year hospitalization in Texas from 1964 to 1968 where he had been given psychiatric treatment and placed on different tranquilizers. Garrett told this psychiatrist of hearing voices, of "other incidents of cutting up people," and of cutting himself in jail because "Little Mama made [him] do it." Garrett also revealed some facts concerning the homicide. Dr. Mutter diagnosed the Defendant as having paranoid schizophrenia and concluded that the Defendant was "currently incapable of aiding in the preparation of his own defense." Dr. Mutter concluded that "[b]ased on available history, it is within medical probability" that Garrett was insane at the time of the crime, and stated, "I consider him extremely dangerous to himself and others." (R. 142-143).

On September 14, 1970, a competency hearing was held. (TR. 1). Psychiatrist Jacobson testified that Garrett was suffering from paranoid schizophrenia, and was

probably so afflicted for the past five to ten years. Dr. Jacobson felt "with some reservations" that Garrett was competent to stand trial. This psychiatrist qualified that "my principal concern in terms of his ability to stand trial would be in insuring that he could maintain his attentiveness and ability during trial." Dr. Jacobson stated that Garrett's prognosis was "poor for a significant long-term remission and that future episodes are likely to recur," and testified that Garrett was a danger to society at this time. Dr. Jacobson recommended that the Defendant "should be admitted to a facility for long-term treatment." (TR. 4-10).

Dr. Jaslow, a psychiatrist, testified that Garrett was able "to relate to me the circumstances surrounding the . . . crime" and was "probably" competent to stand trial. However, under defense questioning, Dr. Jaslow stated that there was a "possibility" that Garrett might not be able to assist his attorney. As to future prognosis, this psychiatrist believed that Garrett's schizophrenic illness was chronic and that "there would be eligibility . . . for repeated episodes of the disturbance where it comes out . . . , more openly, other times with remissions either with or without medication," and that Garrett's condition would deteriorate without "extended help." Dr. Jaslow did note that it was conceivable that Garrett could decompensate more during the course of a trial. This psychiatrist was of the opinion that it was "possible" that violence could occur in the future and recommended that present hospitalization and intensive treatment "would be the best thing" for the Defendant's benefit. (TR. 10-18).

Dr. Mutter testified, consistently with his above-summarized written report, that the Defendant was

not competent to stand trial, that the illness could go into a period of remission but reoccur, and that the nature of Garrett's delusions make him "extremely dangerous." This psychiatrist elucidated that if the voice told Garrett to kill the judge, "he would get out of his chair and try to kill [the judge] or me or anybody in this room." Garrett was a person of violent propensities, who might be a danger to himself and those surrounding him. Dr. Mutter recommended commitment to an institution. (TR. 21-25).

The judge adjudicated the Defendant incompetent to stand trial and committed him to a state hospital in Chatahoochee, Florida.[1] (TR. 27-29).

In an October, 1971 letter, the hospital indicated that Garrett was competent to stand trial. (R. 140-141). The trial judge appointed the same three psychiatrists to evaluate Garrett. (R. 149). In their November reports, the psychiatrists expressed different views. While noting that the Defendant had been receiving large doses of anti-psychotic medication, Drs. Jaslow and Jacobson concluded that Garrett was competent to stand trial. Dr. Jacobson asserted that Garrett's remission was "marginal." Dr. Jaslow indicated that the Defendant "may have been" acutely psychotic at the time of the crime, but that this doctor lacked objective material to

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[1]Prior t the competency ruling, defense counsel indicated a willingness to waive a jury trial. The court responded that such "is always a problem from decisions around the country, whether you can waive [jury] in circumstances like this." (TR. 26). Contrary to what the lower appellate court indicated, the record does not reflect that Garrett waived his right to a jury trial either at this time or at any time prior to his 1978 plea.

permit a valid opinion. Dr. Mutter stated that Garrett could not be properly evaluated because he was on high doses of anti-psychotic medicine, that Garrett was going into remission, and that, if Garrett was released, he could become dangerous to himself and the community. Dr. Mutter expressly recommended that Garrett be withdrawn from all medication for a minimal period of thirty days and then be reevaluated to determine his competency to stand trial. (R. 136-139, 144-145). The trial judge received a request from one state hospital that judges not order the hospital to accept patients without medication, due to limitations on hospital capacity. The trial judge then wrote to the three psychiatrists and, in light of the hospital's request, asked to be advised if they still believed that Garrett should be returned to the hospital with instructions that he should be taken off medication and then should be reevaluated. Approximately ten days later, the judge ordered that Garrett be returned to the hospital, and that the hospital withdraw all medication and reevaluate him to determine his competence to stand trial. (R. 42-44, 148).

A different judge was assigned to try Garrett's arson charge. The Defendant remained at the jail and appeared before the second judge in March of 1972. When his case was called, Garrett rose in the jury box, holding what turned out to be a fake bomb which he had ignited. The entire courtroom was evacuated. After being informed that the first judge had ordered Garrett to the hospital, the second judge ordered Garrett to the hospital "as soon as practically possible." (SR. 2-6).

In September of 1972, the hospital sent a letter to defense counsel, which stated that Garrett had not

been given medication and that, without medication, Garrett had remained competent. Defense counsel had filed a motion to have the Defendant returned to Miami, Florida to be reevaluated for competency to stand trial. A November, 1972 letter from the hospital to the court stated that Garrett had been without medication for six weeks and was deemed competent to stand trial. In March of 1973, the trial judge appointed five doctors to evaluate Garrett, including the three previous psychiatrists and two new psychologists. (R. 146, 157, 159-160, 172).

In their April, 1973 reports, all three psychiatrists and one psychologist concluded that Garrett was incompetent to stand trial, represented a serious danger to himself and others, and needed hospital treatment. Both Drs. Jaslow and Jacobson described Garrett as probably more disturbed now than in the past. Dr. Jaslow suggested additional treatment at a hospital with the recommendation that "medications could be helpful." Dr. Jacobson described the Defendant's behavior as "quite unpredictable." Dr. Mutter recommended that Garrett be recommitted until he went into remission, and "suggested that, when he is felt to be in remission, he be withdrawn from all medication for a minimal period of sixty days to determine his ability to remain emotionally stable." Noting that Garrett had "a great lability" and had demonstrated that his illness could easily be exacerbated, Dr. Mutter stated that Garrett "should not be released under any circumstances." (R. 173-178, 180-182).

On April 12, 1973, the judge, who was assigned to the homicide case, held a hearing and recommitted

Garrett to the hospital with instructions that, after it was determined that Garrett had gone into remission, Garrett's medication should be withdrawn for sixty days to determine his ability to remain emotionally stable. Defense counsel orally moved to have Garrett adjudicated not guilty by reason of insanity pursuant to a new Florida rule of criminal procedure, Fla.R.Crim.P. 3.210(a)(5) (1973). That motion was denied. Several days later, Garrett appeared before the second judge who was assigned to the arson case. That judge reserved ruling on the same motion, but stated that he would rule in accordance with the appellate court decision which would result from the defense's appeal of the first judge's ruling on Garrett's motion for an adjudication of insanity. (TR. 39-44; R. 131, 179, 184). That appeal was subsequently dismissed in October of 1973. *Garrett v. State*, 283 So.2d 905 (Fla. 3d DCA 1973).

Pursuant to the hospital's request that Garrett be returned, an order was entered in March of 1974, that the Defendant be returned to Miami and evaluated by Drs. Mutter and Jaslow. This order *did not* contain a prohibition on giving medication to the Defendant. In their April, 1974 reports, both psychiatrists found Garrett competent to stand trial. However, Dr. Mutter ended his report by stating (1) that Garrett "cannot be properly evaluated when he is under such high doses of anti-psychotic drugs," (2) that it was "most probable" that Garrett would decompensate and become a danger to himself and others, if his medication was stopped, (3) that the ideal form of treatment for Garrett would be rehospitalization and continued psychiatric treatment "until he is at the point where he might be able to remain in remission without the use of anti-psychotic drugs," and (4) that Garrett was "still unstable and

should be returned to a confined setting until he [was] more stabilized," be given further treatment and be reexamined "to determine his ability to maintain stabilization in the community." (R. 190, 194-198).

The homicide case was reassigned to the judge who had been assigned to the arson case. (R. 193). At a June 26, 1974 hearing, it was revealed that Garrett had "attacked one of the [jail] nurses who went to administer medication." *Defense counsel* asserted that, based on his conduct in the jail, Garrett was not competent to stand trial now and would probably never be competent to stand trial. Defense counsel moved to have the Defendant declared not guilty by reason of insanity and committed to a mental hospital. This trial judge stated that he had "no report that says [Garrett] will never be competent" and that the last report to the court was that Garrett was competent. The judge denied the defense request "to just instanter find him not guilty by reason of insanity" and ordered Garrett recommitted to a hospital. The written commitment order contained *no* prohibition regarding the administration of medication to the Defendant. (TR. 46-51; R. 3).

In mid-August of 1974, approximately one and one-half months after the last court hearing, the hospital wrote the court and communicated that Garrett was on medication, that he was competent to stand trial, that he could only be maintained in remission by medication, and that he had "the potential for dangerous behavior in the community." The hospital also wrote that Garrett's commitment "ought not to continue indefinitely and that some other disposition be considered." (R. 4-5). In

September of 1974, the trial judge denied the hospital's request to return Garrett to court "at this time." (R. 6).

In November of 1974, the hospital presented Garrett's case to a hearing examiner, who ordered Garrett involuntarily hospitalized for a four month period. In May of 1975, Garrett again appeared before a hearing examiner, who ordered Garrett involuntarily hospitalized for one year and recommended that he be returned to court. (R. 10).

A third judge was now assigned both cases. In August of 1975, the hospital requested that Garrett be returned to court. A July, 1975 hospital memorandum reflected that Garrett was on medication and had received psychotherapy, occupational therapy and recreational therapy. This memorandum revealed that Garrett engaged in fighting and aggressive behavior on several occasions, and that, as a result, Garrett spent his entire stay in the hospital on a closed ward. (R. 8-10). The trial judge ordered Garrett returned and appointed Drs. Mutter, Jaslow and Jacobson to examine him. (TR. 59-63, R. 11-12).

In their September, 1975 reports, all three psychiatrists opined that Garrett was competent to stand trial, although two of these doctors observed that Garrett was receiving "very high doses" of psychotropic medication. During an interview with Dr. Mutter, the Defendant was able to relate facts concerning

the homicide.[2] Dr. Mutter also expressed his view that "[d]espite the outcome of this case [Garrett] should not be released under any circumstances unless it can be shown that he can function in a normal manner, and not be dangerous to himself or others with reduced medication." (R. 15-21).

A trial court hearing was held on October 2, 1975. A prosecutor stated that the Defendant was heavily medicated and requested that the Defendant be taken off medication and evaluated. That prosecutor stated, "It's like chaining a man down so he can't move his arms, legs or anything, and [saying], 'Well, he didn't swing at me.' I mean it is just absurd to evaluate a man this way." Defense counsel requested that Garrett be permitted to stand trial, based on the psychiatric reports. After argument, the trial judge changed her mind and granted the prosecutor's request, stating, "I don't think that's the meaning of the law. The law is if he is competent to stand trial. It doesn't say if he takes enough medicine not to be violent he is competent to stand trial." That day the judge entered a written order directing that the jail refrain from giving any medication to the Defendant, and appointing psychiatrists to reexamine the Defendant. (TR. 65-68; R. 22).

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[2]This report provides: "[Garrett] stated, 'We were at a night club. Me and my friend were there. I tried to tell the police that I was sick and wanted to go to the hospital. I could recognize my sickness but I had it before. I was hearing voices. The police came and stopped my friend and me. The police were beating on him. I told him to run. He ran. I ran and then came back to the scene. The police officer was staggering. I got a gun and told him to stop. He turned around. I thought he was going to shoot me, then I shot him.' "

In their November, 1975 reports, both psychiatrists concluded that Garrett had severely regressed and was no longer competent to stand trial, as a result of the withdrawal of medication. Dr. Mutter stated that Garrett should not be released under any circumstances because he was "extremely dangerous." That doctor also stated, "It is quite apparent that his former psychiatric treatment consisted only of drug therapy and not any type of psychotherapy where he could have gained insight into his problem and gained greater ego strength." Dr. Mutter recommended that Garrett be recommitted to a hospital "for long-term treatment, psychotherapy as well as chemotherapy, so that he may be properly rehabilitated to the extent that he does not pose a danger to himself or others." (R. 201-204).

On December 3, 1975, defense counsel requested a hearing to have the Defendant adjudicated not guilty by reason of insanity on the grounds that there was no substantial probability that Garrett would become competent in the forseeable future, and that no progress was being made toward the goal of making Garrett competent. The trial judge noted that insanity at the time of the commission of the crime was a question of fact to be determined by the jury and denied the defense motion "at this time." Based on the recent psychiatric reports, the judge found that Garrett was incompetent to stand trial "at this time" and recommitted him to a hospital. (TR. 74-79; R. 23, 205).

Hospital correspondence of June 4, 1976, requested that Garrett be returned to court, since Garrett was treated with "a full range of hospital programs including psychotherapy," had not been on psychotropic medication

for over two months and was legally competent. (R. 24-26). Ten days later, the hospital sent another letter requesting that Garrett be retained at the hospital because he had decompensated and was no longer competent to stand trial. (R. 27). In August of 1976, the hospital asserted that Garrett was competent to stand trial, and requested his return to court with the recommendation that Garrett should be kept on psychotropic medication, due to his tendency to decompensate in its absence. (R. 29-31).

The trial judge ordered that the Defendant should be returned to Miami, directed that he should be held in the jail for four months without medication, and appointed three psychiatrists to evaluate him. (TR. 85-88; R. 33, 37, 206).

In October of 1976, the trial court denied a defense motion (1) to have the judge adjudicate the Defendant not guilty by reason of insanity and civilly commit him, and (2) to provide the Defendant with medication immediately, on the ground that the court order depriving him of medication amounted to cruel and unusual punishment. (R. 135, 209-210 [A]).

After examining Garrett when he had been without psychotropic medication for several months, all three psychiatrists concluded in their February, 1977 reports that Garrett was not competent to stand trial. Based on his interview with the Defendant, Dr. Jacobson stated, "[T]here is some possibility that he does exaggerate and alter his symptomatology for conscious reasons," although he was suffering from a schizophrenic disturbance. That psychiatrist also rendered the opinion

that "there is a possibility and not an improbable or unlikely one, that the defendant could acquire competency for trial if he were maintained on anti-psychotic medication," while asserting that the converse would be true if the Defendant was not allowed to take medication. Dr. Jaslow noted that Garrett did express certain ideas that showed the ability to think and reason. Finally, Dr. Mutter also concluded that Garrett was homicidal, "should not be released under any circumstances," and had the propensity to repeat his homicidal behavior while in a psychotic state. That psychiatrist recommended that Garrett be committed to a mental facility "until . . . he is able to enter a state of remission without benefit of medication." (R. 211-220).

The defense filed a motion claiming (1) that the Defendant was entitled to discharge for violation of his federal and Florida rights to a speedy trial, (2) that Garrett's continued confinement on the basis of his incompetency violated due process under *Jackson v. Indiana*, 406 U.S. 715 (1972), and (3) that the judge should adjudicate the Defendant not guilty by reason of insanity and civilly commit him pursuant to the provisions of a Florida rule of criminal procedure. (R. 40-41).

On March 2, 1977, a lengthy hearing was held on the Defendant's motion. The defense stipulated that Garrett was presently incompetent and a possible danger to himself. Drs. Jaslow, Mutter and Jacobson all testified that there was a substantial probability that Garrett would be competent in the forseeable future, if the court permitted him to be maintained on psychotropic

medication. The trial judge asked Dr. Mutter whether, if Garrett were receiving intensive psychotherapy, he could conceivably regain competency to the point where he could be maintained on lighter doses of psychotropic medication and not decompensate if the medication was stopped for a short period of time. That psychiatrist answered that there was a "great possibility, even probability" that this could be done and that it "would give him a better chance than if he were just treated on medication alone." Dr. Jacobson testified that psychotropic medication had drawbacks, had side effects and was occassionally ineffective, but that Garrett tolerated his medication well and did not seem to suffer much in the way of secondary effects. Dr. Jaslow testified that he had not observed that Garrett was suffering from any side effects, and could not think of a medical reason for curtailing the medication if Garrett was not showing any serious side effects. The clinical director of one of the state hospitals testified that it was "poor" medical practice to deprive Garrett of his medication and that his hospital lacked enough staff to give verbal insight therapy. (TR. 91-184).

Following the taking of testimony, the prosecution requested that Garrett be recommitted, returned to competency, and, thereafter, maintained on psychotropic medication "so we can try him." The trial court denied Garrett's motion on all grounds, found the Defendant incompetent to stand trial "at this time" and committed him to the hospital. (TR. 199, 209-210; R. 41 [A], 45-46).

In August of 1977, the hospital informed the court that Garrett was competent to stand trial with medication. (R. 47-48). In October, the *defense* rejected a stipulation

that Garrett was competent to stand trial and requested a hearing on this issue. (R. 55-59).

On November 1, 1977, a competency hearing was held. The prosecution called five witnesses from the state mental hospital in support of its position that Garrett was competent. *Defense counsel Beller* argued that Garrett was not competent to stand trial, because he was in remission only due to psychotropic medication and because this attorney could not determine whether the medication would affect Garrett's ability to confer with counsel. The prosecutor argued that the unanimous opinion of all of the witnesses was that Garrett was competent to stand trial, and, further, that there were no indications by case law, statute or state court rules of criminal procedure that a defendant could not lawfully be tried while competent as a result of psychotropic medication. Following argument, the trial judge ruled that Garrett *was* competent to stand trial. (TR. 216-248; R. 62).

A December trial date was changed to the end of January, 1978, as a result of the defense's assertion that the first trial date was much too early. In mid-January, the trial judge denied a defense motion to discharge Garrett for a speedy trial violation. In mid-January, the defense then sought a writ of prohibition from the appellate court and obtained an order to show cause. However, the prohibition proceedings were subsequently dismissed on March 3, 1978 in *State ex rel. Garrett v. Morphonios*, 356 So.2d 392 (Fla. 3d DCA 1980). (TR. 252; R. 77-78, 95-107).

On April 24, 1978, Garrett pled guilty to both crimes. He was sentenced to life imprisonment and a

consecutive ten year sentence. The Defendant's plea was subsequently changed by counsel to utilize a procedure allowing Garrett to take an appeal.[3] Garrett expressly and *exclusively* limited his appeal to the issue of whether his federal and Florida speedy trial rights were violated. (R. 108-115; 239, 241; TR. 276-283).

Both the Defendant and the State of Florida filed briefs in the lower appellate court, which briefs exclusively addressed Garrett's speedy trial claims. The decision of *Jackson v. Indiana*, 406 U.S. 715 (1972), was not relied on at all in these briefs.[4]

On November 4, 1980, the lower appellate court surprised the State of Florida by rendering a decision based exclusively on *Jackson v. Indiana, supra.* The lower appellate court did not address the Defendant's speedy trial claims at all. (App. 1-4).

In a lengthy motion for rehearing, the State of Florida contended (1) that the appellate court decided this case on an issue not before it and should resolve this case solely on speedy trial grounds, and (2) that *Jackson* was misinterpreted by the court in that *Jackson* did not require discharge from criminal liability merely

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[3]This procedure is authorized under Florida law by means of a plea of nolo contendere, but permits only an appeal of legal issues that would be dispositive of the case. *Brown v. State*, 376 So.2d 382 (Fla. 1979); *State v. Ashby*, 245 So.2d 255 (Fla. 1971).

[4]*Jackson* was cited by the State of Florida solely as an historical fact in a parenthetical note, while commenting on Dr. Mutter's past recommendations in terms of the Defendant's speedy trial claims.

because a defendant is incompetent and not substantially likely to regain competence in the forseeable future, but rather required release from confinement pending trial. (App. 8-17). The appellate court entered an order denying this motion for rehearing, without further discussion. (App. 5).

REASONS FOR GRANTING THE WRIT

In *Jackson v. Indiana*, 406 U.S. 715 (1972), this Court reviewed a pre-trial order committing a criminal defendant to a mental hospital pending trial. That defendant was not mentally ill in the medical sense, but was handicapped to the degree that he was then legally incompetent to be tried consistent with the Constitution. This Court found due process and equal protection deficiencies in the Indiana pre-trial commitment procedure that would, in effect, permit indefinite confinement of that criminal defendant, without the rights and protections given to similarly handicapped non-criminally-charged persons and without a trial to determine his guilt or innocence on the very criminal charges which were being used as the exclusive basis for his confinement. Regarding release *from the mental institution* pending trial, this Court held that such detention for trial must be limited to no "more than the reasonable period of time necessary to determine whether there is a substantial probability that [the defendant] will attain [the] capacity [to stand trial] in the forseeable future." *Id*, 406 U.S. at 738. This Court also held that, even if the first condition for continued confinement was realized, continued commitment must be justified by progress toward the goal of legal competency to

stand trial. *After* ruling on the lawfulness of Jackson's pre-trial detention, this Court commented on *the right to try* the defendant on the pending criminal charges, but expressly refrained from ruling on that issue. This Court did suggest, "*Dismissal of the charges* against an incompetent accused [is] justified on . . . the . . . right to a speedy trial, or the denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence." *Id*, 406 U.S. at 740. This latter portion of *Jackson* was unambigously separated from the pre-trial detention issues.

Jackson did not hold that any right to release from pre-trial detention pending trial also constituted a right not to be tried on the criminal charges. Indeed, it is an established rule of federal constitutional law that an "illegal . . . detention does not void a subsequent conviction." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

In the instant case, the lower appellate court reversed Garrett's judgment of conviction solely "on the basis that, under the holding of *Jackson v. Indiana*, 406 U.S. 715 . . . (1972), he should never have been brought to trial." Noting that *Jackson* was decided on due process and equal protection grounds, the particular holding, on which this decision was based and which was quoted in the opinion, was that portion of *Jackson* addressing the right to pre-trial release from a mental institution.[5]

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[5]The lower appellate court never analyzed the facts in terms of the speedy trial analysis mandated by *Barker v. Wingo*, 407 U.S. 514 (1972), and the status of the case at the time of the plea, *United States v. MacDonald*, 435 U.S. 850 (1978). From a speedy trial perspective, the State of Florida's position that Garrett was

(App. 2-3) The lower court concluded (App. 3-4):

> On these facts, we find Garrett to have been held more than a "reasonable period" without the requisite determination of the likelihood of his eventual ability to stand trial. Moreover, since it appears that the trial court was of the opinion that Garrett was per se incompetent while under the influence of his medication—a belief not legally untenable until 1977 (when Section 918.15(4)(a), *supra*, was passed), it is clear that had the court held the hearing mandated by *Jackson*, at any time prior to 1977, it would necessarily have found Garrett permanently incompetent. Under *Jackson*, the trial court should have entertained civil commitment proceedings by the state, or released him.
>
> We reverse and order that the court below discharge Garrett unless the State shall elect to commence civil proceedings within thirty days from the issuance of our mandate.

(Footnote 5 Continued)

not entitled to a dismissal of charges is strong. *See, e.g., United States v. Mills*, 434 F.2d 266 (8th Cir. 1970); *United States v. Beidler*, 417 F.Supp. 608 (M.D. Fla. 1976); *United States v. Lancaster*, 408 F.Supp. 225 (D.D.C. 1976); *United States ex rel. Daniels v. Johnston*, 328 F.Supp. 100 (S.D.N.Y. 1971); *Campbell v. State*, 265 Ark. 77, 576 S.W. 2d 938 (1979); *People v. Lang*, 62 Ill. App. 3d 688, 378 N.E. 2d 1106 (1978); *Harris v. State*, 262 Ind. 208, 314 N.E. 2d 45 (1974); *State v. Bauer*, __ Minn. __, 299 N.W. 2d 493 (1980); *State v. Brown*, 502 S.W. 2d 295 (Mo. 1973); *State v. Johnson*, 579 S.W. 2d 771 (Mo. Ct. App. 1979); *State v. Durham*, 545 P.2d 805 (Okla. Crim. App. 1976); *Fry v. State*, 529 P.2d 521 (Okla. Crim. App. 1974); *Commonwealth v. McQuaid*, 464 Pa. 499, 347 A.2d 465 (1975).

It is clear from the face of this opinion that this case was resolved *exclusively* on a federal constitutional basis. This analysis and result directly conflicts with the aforementioned decisions of this Court.[6] A State may not impose greater restrictions, as a matter of federal constitutional law, when this Court specifically refrains from imposing them. *Fare v. Michael C.*, 442 U.S. 707 (1979); *Oregon v. Hass*, 420 U.S. 714 (1975).

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[6]It is clear that Garrett was not illegally incarcerated prior to being adjudicated competent to stand trial.

It is indisputable that Garrett was civilly committable during the entire period of time which elapsed prior to his guilty plea and that such a commitment would have been constitutional. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *In re Beverly*, 342 So.2d 481 (Fla. 1977).

No psychiatrist suggested that Garrett could not attain legal competence in the forseeable future. Unlike the factual situation in *Jackson*, Garrett was mentally ill, suffering from paranoid schizophrenia. Treatment takes time. Given the seriousness of a charge of first-degree murder and the nature of Garrett's illness, the seven year period that was consumed before Garrett was adjudicated legally competent cannot be deemed constitutionally unreasonable. And, of course, the best demonstration of what could be was what did occur. Garrett was adjudicated competent to stand trial within seven years.

Although bail was never sought, it cannot now be seriously contended that Garrett would have been released on bail, even if it is assumed that Garrett was not mentally ill.

Finally, any issue that Garrett had been entitled to release pending trial became moot after his guilty plea. *See Weinstein v. Bradford*, 423 U.S. 147 (1975); *compare Gerstein v. Pugh*, 420 U.S. 103 (1975). In this regard, the lower appellate court ruled on a controversy that no longer existed.

Moreover, the decision *sub judice* directly conflicts with the following decisions of other state courts of last resort. *State v. Superior Court of Maricopa County*, 113 Ariz. 432, 556 P.2d 6 (1976); *People v. Lang*, 76 Ill. 2d 311, 391 N.E. 2d 350 (1979); *People v. Lang*, 62 Ill. App. 3d 688, 378 N.E. 2d 1106 (1978); *People v. Ealy*, 49 Ill. App. 3d 922, 365 N.E. 2d 149 (1977); *People v. Williams*, 48 Ill. App. 3d 842, 362 N.E. 2d 1306 (1977); *State v. Bauer*, ____ Minn. ____, 299 N.W. 2d 493 (1980); *Brown v. Jaquith*, 318 So.2d 856 (Miss. 1975); *Commonwealth v. McQuaid*, 464 Pa. 499, 347 A.2d 465 (1975); *Commonwealth v. Kerrigan*, ____ Pa. Super. Ct. ____, 413 A.2d 729 (1979); *State ex rel. Desinger v. Treffert*, 85 Wis. 257, 270 N.W. 2d 402 (1978); *State ex rel. Porter v. Wolke*, 80 Wis. 2d 197, 257 N.W. 2d 881 (1977); *State ex rel. Haskins v. County Court of Dodge County*, 62 Wis. 2d 250, 214 N.W. 2d 575 (1974).[7] Those decisions show that the *Jackson* right to release from a mental institution pending trial, itself, *does not* vitiate the right of the government to later try a defendant for his crime.

By equating the right to release from a mental institution pending trial with the right to pre-trial release on bail, the legal error in the analysis employed by the lower appellate court becomes glaringly apparent.

Recent history has shown that the mentally ill, or those claiming mental illness, have committed and will continue to commit crimes that shock the nation. The frustration that the general public has with the judicial response to mental illness in the criminal justice system

[7]The lower appellate court's decision also conflicts with *United States v. Lancaster*, 408 F.Supp. 225 (D.D.C. 1976).

is great. The question presented for review in this case is a substantial one in terms of its effect on the administration of criminal justice. The recurring nature of this problem warrants a clarification of *Jackson v. Indiana*, 406 U.S. 715 (1972) by this Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion in *Garrett v. State*, 390 So.2d 95 (Fla. 3d DCA 1980).

Respectfully submitted,

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Counsel for Petitioner

Appendix

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1980

CASE NO. 78-1098

WILLIE ALLEN GARRETT,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Opinion filed November 4, 1980.

An Appeal from the Circuit Court for Dade County, Ellen Morphonios Gable, Judge.

Terry L. DeMeo; Louis R. Beller; Bruce J. Winick, for appellant.

Jim Smith, Attorney General and Steven L. Bolotin, Assistant Attorney General, for appellee.

Before HUBBART*, C.J., and HENDRY and NESBITT, JJ.

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*Judge Hubbart participated in the decision in this case but did not hear oral argument.

PER CURIAM.

Appellant was arrested on May 23, 1970, and charged with first-degree murder of a police officer, and arson in the second degree. Trial by jury was waived. At his arraignment on July 9 of that year, the issue of his competency was first raised. Three psychiatrists were appointed at that juncture to assess Garrett's ability to participate meaningfully in his defense. After receiving the evaluation reports of the three experts, the court found Garrett incompetent to stand trial. He was placed into the custody of the state's Division of Mental Health, Department of HRS, and admitted into Florida State Hospital at Chattahoochee for restoration to competency. There he was treated with psychotropic medication, and his symptomatology entered a period of remission. On October 14, 1971, the Clinical Director of that institution informed the court that appellant had been turned over to the Dade County Sheriff's Office for further disposition, i.e. to stand trial.

Thereafter, the court ordered Garrett removed from all medication, to assess the change, if any, in his faculties. Garrett soon relapsed into his earlier psychotic state, and was thereupon returned to Chattahoochee.

This process of remission and relapse occurred repeatedly over the next six years, until Garrett was finally positively evaluated for competency while under medication pursuant to Section 918.15(4)(a), Florida Statutes (1977). He entered a *nolo* plea, reserving the right of appeal to this court.

We reverse the judgment of the court below on the basis that, under the holding of *Jackson v. Indiana*,

406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), he should never have been brought to trial.

Jackson was a twenty-seven-year-old deaf-mute of pre-school mentality arrested for two robberies netting him a total of nine dollars. Obviously unable to assist in his own defense, he was committed to the Indiana equivalent of Chattahoochee, until such time as he should be ready to stand trial. After a period of years, his incarceration was challenged on due process and equal protection grounds. After state court avenues of relief had been exhausted, his case was heard by the Supreme Court, which held, inter alia, that

> a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil committment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

32 L.Ed.2d at 451.

On these facts, we find Garrett to have been held more than a "reasonable period" without the requisite determination of the likelihood of his eventual ability to stand trial. Moreover, since it appears that the trial court was of the opinion that Garrett was per se

incompetent while under the influence of his medication — a belief not legally untenable until 1977 (when Section 918.15(4)(a), supra, was passed), it is clear that had the court held the hearing mandated by *Jackson*, at any time prior to 1977, it would necessarily have found Garrett permanently incompetent. Under *Jackson*, the trial court should have entertained civil commitment proceedings by the state, or released him.

We reverse and order that the court below discharge Garrett unless the state shall elect to commence civil proceedings within thirty days from the issuance of our mandate.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1980
MONDAY, DECEMBER 8, 1980

CASE NO. 78-1098

WILLIE ALLEN GARRETT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for appellee having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

[Signature illegible]

Clerk District Court of
Appeal, Third District

SUPREME COURT OF FLORIDA
FRIDAY, APRIL 10, 1981

CASE NO. 60,065

District Court of Appeal,
3d District — No. 78-1098

STATE OF FLORIDA,

Petitioner,

v.

WILLIE ALLEN GARRETT,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, Acting C. J., OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

by: [Signature illegible]
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 78-1098

WILLIE ALLEN GARRETT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING

Appellee hereby moves this court for rehearing in the above cause and in support thereof states the following:

I

CONSIDERATION OF THE ISSUE WHICH FORMED THE BASIS FOR THIS COURT'S OPINION WAS IMPROPER.

(1) This court found that reversal should result due to the failure of the trial court to hold a hearing as to the likelihood of Appellant's eventual ability to stand trial and the fact that it is apparent from the record that had such a hearing been held, the trial court would have necessarily found Appellant permanently incompetent. Slip opinion at 3.

(2) The question of whether these factors require reversal, however, *was not raised as an issue in this*

case. It was not briefed by either party or even asserted by Appellant. Rather, the issue here was phrased strictly in speedy trial terms, both rule and constitutional. (Appellant's brief, p. i). Indeed, Appellant could not have raised the issue in any other way, as this appeal arose pursuant to a plea of nolo contendere. Under such circumstances, only the claim or claims specifically reserved may be considered on appeal.

(3) Appellee therefore submits that the issue upon which this court decided this case is not a proper matter to be considered in this proceeding and that rehearing should be granted and the case dealt with strictly on the the speedy trial claims.

II

THE REQUIREMENTS OF *JACKSON V. INDIANA*, 406 U.S. 715 (1972) DO NOT MANDATE THE CONCLUSION REACHED BY THIS COURT.

(4) Even if the issue determined by this court is held to be a proper subject to consider, rehearing should nonetheless be granted as this court's conclusion that Appellant has to be discharged or that civil committment proceedings have to be commenced is based upon a misinterpretation of the dictates of *Jackson v. Indiana*, 406 U.S. 715 (1972), the case upon which this court primarily relied.

(5) The opinion in *Jackson in no way requires discharge from criminal liability* of a defendant who is incompetent to stand trial. Indeed, the Court specifically

declined to hold in such a manner. 406 U.S. at 739. The court noted that dismissal of charges against an incompetent might be justified in a given case on a speedy trial or due process analysis, but to hold, as this court has, that *Jackson* requires discharge merely because a defendant is incompetent and not substantially likely to regain competence in the foreseeable future is clearly a misinterpretation of the opinion.

(6) This fact is made apparent not just by the language of *Jackson*, but also by the opinion in *United States v. Lancaster*, 408 F.Supp. 225 (D.C. Cir. 1976), in which the government was required pursuant to *Jackson* to either release or civilly commit an incompetent defendant. Following an unsuccessful attempt to commit, the defendant was released to the custody of his aunt. Despite numerous continued findings of incompetency and unlikelihood that the defendant would become competent, the trial court analyzed the question under a speedy trial analysis and found that since, under the facts of that case, no speedy trial violation had occurred, dismissal was unwarranted. A similar conclusion was reached in *Commonwealth v. Kerrigan*, 413 A.2d 729 (Penn. 1979). See also *In re Harmon*, 425 F.2d 916 (1st Cir. 1970) (if incompetent defendant is committed to custody of Attorney General under federal law, court should require frequent reports on accused's mental condition, demonstrating the court's intention that the charges would remain pending); *United States ex rel. von Wolfersdorf v. Johnston*, 317 F.Supp. 66 (S.D.N.Y. 1970) (state defendant confined for nearly 20 years as incompetent in hospital for criminally insane entitled to civil committment, but question of whether he could be tried should he regain competence was speedy trial

question). Cf. *State v. Lee*, 602 P.2d 944 (Hawaii 1979) (motion for judgment of acquittal on basis of incompetence at time of trial should be deferred and case suspended until defendant can assist counsel; potential prejudice neutralized by court's authority under Hawaii law to dismiss when sufficient time has passed that it would be unjust to resume proceedings, an analysis very similar to a constitutional speedy trial analysis.

(7) Also instructive is the United States Supreme Court's opinion in *Drope v. Missouri*, 420 U.S. 162 (1975). In that case, the Court found that the state trial court erred in not holding a hearing at the time of trial as to the defendant's competence, but noted specifically that the State was free to retry the defendant if found to be competent. 420 U.S. at 183. See also *Lokes v. Capps*, 625 F.2d 1258, 1268, n.5 (5th Cir. 1980), viewing in issue in terms of speedy trial analysis.

(8) The reasoning of this line of cases is applicable here. The framework within which the issue presented should be considered is strictly a speedy trial one. The requirement of *Jackson* that upon a finding of incompetence, a defendant be committed or released means just that and no more, released, free to walk the streets, but certainly not discharged from criminal liability merely because of his incompetence. It must be remembered that the holding in *Jackson* was addressed to the primary question presented by that case, whether the defendant was entitled to *release from confinement* since he had neither been convicted nor committed. In no way did it hold that the criminal charges cannot proceed when, as here, the defendant reaches a state of competence. Thus, *Jackson* does not stand for the

proposition that discharge is warranted and this court should reconsider its opinion accordingly.

III

THE FACT THAT THE TRIAL COURT DID NOT MAKE A DETERMINATION OF THE LIKELIHOOD OF APPELLANT BECOMING COMPETENT TO STAND TRIAL DOES NOT SUPPORT THE RESULT REACHED BY THIS COURT.

(9) As noted in the discussion under part II of this motion, a defendant who is incompetent and unlikely to become so in the foreseeable futute is not entitled to discharge from criminal liability, but only to release or committment. Thus, had the trial court held the hearing contemplated by *Jackson*, regardless of what action it took within the dictates of *Jackson*, the fact would remain that Appellant, upon regaining competency, would still have been subject to prosecution, assuming that dismissal would not have been required under a speedy trial analysis. Thus, any remedy Appellant might have as regards the failure to properly hold a hearing should not relate to the charges against him, as any error as to this matter would not have affected those charges, and surely should not compel reversal. See *Florida Statutes* §924.33. Rather, whatever remedy Appellant might have would be by way of a civil suit for damages. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

(10) Even if discharge would have been appropriate upon a finding of incompetency, it cannot be concluded

that that would have been the action the trial court would have taken had it conducted a hearing under *Jackson*. This is so for a number of reasons. (A) In the first place, no emphasis was placed in the psychological evaluations on the likelihood of Appellant returning to competence. Had this matter been at issue, the question would have been dealt with in detail and the trial court's decision would have undoubtedly taken this factor into account. There is no way of knowing what conclusions would have been reached in this regard. (B) Further, there can be no doubt that at the time Appellant was evaluated, the question of whether a defendant could be considered competent while on psychotropic medication was one which was open to question. Although the trial court did, as this court noted, believe that a defendant could not be competent in such a situation, it is quite possible that if the court was faced with the alternative of either trying or releasing the defendant, it might have chosen to try him, recognizing that the position that the defendant was competent was clearly at least arguable, thereby allowing the matter to be determined by an appellate court. (C) In addition, the matter might have been determined by an appellate court contrary to the trial court's belief in a proceeding instituted by the state, be it appeal or extraordinary writ. In fact, in at least two cases in other jurisdictions, courts have in the body of orders dealing with similar issues, stayed the effect of the order to allow for a government appeal. *United States v. Pardue*, 354 F.Supp. 1377 (D.Conn. 1973); *United States v. Jackson*, 306 F.Supp. 4 (N.D. Cal. 1969). (D) It should also be considered that the mere expressions of initial opinion expressed by the court would not necessarily have been the final result reached by the court had it dealt squarely with

the issue in the context of a hearing, having at that time the benefit of argument by counsel to the precise point and of the court's own research.

(11) Even if it is held that the trial court, had it held a hearing, would have discharged Appellant from criminal liability and that such discharge would not have been disturbed by an appellate court, the action taken by this court would still be inappropriate. This is so because the trial court in reaching such a conclusion would have been wrong, since, as has become apparent subsequent to the time at which a hearing would have been held, Appellant was in fact competent at the time. As both parties have noted in their briefs, and as this court implicitly noted in its opinion by pointing out that the trial court's belief was not untenable until 1977, a person who is competent only on psychotropic medication can properly be tried. Thus, Appellant was in fact competent to have stood trial at the time a hearing under *Jackson* would have been held. This court's conclusion can therefore only be sustained on a theory that because the trial court would have acted erroneously if it had acted at all, the proper remedy is to remand with directions that the erroneous action occur. Such an approach is clearly inappropriate. The law that applies on appeal is that in effect at the time an appeal is decided, even when there has been a change of law since the time of the trial. *Wheeler v. State*, 344 So.2d 244 (Fla. 1977); *Evans v. St. Regis Paper Co.*, 287 So.2d 296 (Fla. 1973); *Williams v. Wainwright*, 325 So.2d 485 (Fla. 4th DCA 1975); *Cosby v. State*, 297 So.2d 617 (Fla. 1st DCA 1974). In reaching its conclusion here, this court is applying not the law at the time of the appeal, not even the law at the time of the trial, but

the trial judge's apparent misconception of the law at that time. Appellee submits that such an approach is wholly unwarranted. Moreover, since, as has been previously pointed out, the result that would have been reached had the trial court held a hearing, would have, at best for Appellant, been the same as was actually reached, that is, he would not have been tried until it became clear that a person on psychotropic medication could properly be held competent, any error in not holding a hearing cannot be considered grounds for reversal as it in no way would have injuriously affected Appellant's substantive rights. *Florida Statutes* §924.33.

IV

CONSIDERING THIS CASE WITHIN A SPEEDY TRIAL FRAMEWORK, REVERSAL SHOULD NOT RESULT.

(12) As noted in part I of this motion, the only issue reversed and presented to this court was the question of whether Appellant was denied a speedy trial. As discussed throughout this motion, the real question to be determined in considering the propriety of trying a defendant who has previously been held incompetent is a speedy trial question. Thus, this court's attention should focus on that issue in determining whether reversal is appropriate in the present case.

(13) As to this issue, it should be noted that Appellant has presented claims that both his constitutional and rule speedy trial rights were violated. As regards each of these claims, Appellee relies upon the argument set forth in its brief. Appellee notes additionally, however, the existence of a case, decided subsequent to the filing of briefs and to argument in this cause, which compels the conclusion that Appellant's claims must be rejected as regards the claimed constitutional violation. In *Sliger v. State*, 382 So.2d 373 (Fla. 5th DCA 1980), the court held that a claim of a constitutional speedy trial violation may not be reversed for review on a plea of nolo contendere, in that proceeding in such a manner deprives the court of a chance to assess the prejudice to the defendant, a key factor in reviewing such claims. Indeed, a defendant might well, in a given case, be able to present as able a defense many years after the fact as he might have at the time the charges are filed, or at least be able to present a sufficient defense that he might be acquitted. When no trial is held, however, it is impossible to assess these factors. The reasoning of *Sliger* is equally applicable here and should preclude review of Appellant's constitutional claim. This case should therefore be considered only as a rule speedy trial case and should be, for the reasons set forth in Appellee's brief, affirmed.

WHEREFORE, Appellee respectfully requests that this court grant rehearing in the above cause and affirm the judgment of the trial court.

Respectfully submitted,

JIM SMITH
Attorney General

/s/
ANTHONY C. MUSTO
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the instant Petition for a Writ of Certiorari was mailed by depositing same for mailing at a United States post office with first-class postage pre-paid to counsel for Respondent Garrett, Terry L. DeMeo, DeMeo and Sherman, P.A., ACLU Foundation of Florida, Inc., 3081 Salzedo Street, Coral Gables 33134, and Bruce J. Winick, ACLU Foundation of Florida, Inc., University of Miami School of Law, P.O. Box 248087, Coral Gables, Florida 33124, and Louis R. Beller, ACLU Foundation of Florida, Inc., 420 Lincoln Road, Suite 238, Miami Beach, Florida 33139, on this the 9th day of July, 1981.

/s/ _____
ARTHUR JOEL BERGER
Assistant State Attorney

ORIGINAL

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SUPREME COURT, U.S.

No. 81-53

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE STATE OF FLORIDA,

Petitioner,

v.

WILLIE ALLEN GARRETT,

Respondent.

On Petition for a Writ of Certiorari to the
District Court of Appeal of Florida,
Third District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the court below reversing Respondent's conviction and ordering that the trial court discharge him unless the state shall elect to commence civil proceedings within thirty days was based on former Florida Rule of Criminal Procedure 3.210(a)(5) and present Florida Rule of Criminal Procedure 3.217(b), an independent and adequate state law ground precluding review by this Court on certiorari?

2. Whether the court below's reversal and order of discharge on facts involving the confinement for almost an eight year period of an incompetent accused was based on the federal constitutional principles embodied in Jackson v. Indiana, 406 U.S. 715 (1972), and if so, whether such a holding would conflict with Jackson?

3. Whether the federal constitutional right to speedy trial was violated by a delay of almost eight years, all but at most several months of which is chargeable to the state as a result of a combination of prosecutorial and judicial action designed to frustrate Respondent's opportunity to face his charges by repeatedly halting the medical treatment that psychiatrists warned was necessary to maintain his competence to stand trial, as well as from judicial inaction in violation of state law and from clerical error and neglect by a series of court clerk, jailers, hospital officials and prosecutors, where this lengthy delay was objected to on many occasions by Respondent, and resulted in pre-trial incarceration of the most oppressive kind, exacerbated Respondent's mental illness, and impaired the possibility of his mounting either a factual defense or a defense based on legal insanity?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE STATE OF FLORIDA,

Petitioner,

v.

WILLIE ALLEN GARRETT,

Respondent.

On Petition for a Writ of Certiorari to the
District Court of Appeal of Florida,
Third District

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 390 So.2d 95, and appears in the Appendix to the Petition for Certiorari at pp. App. 1- App.4. The opinion of the Supreme Court of Florida, denying review, is unreported, and appears in the Appendix to the Petition for Certiorari at pp. App. 6-App.7.

CONSTITUTIONAL PROVISIO AND FLORIDA RULES OF CRIMINAL PROCEDURE INVOLVED

Former Florida Rule of Criminal Procedure 3.210(a)(5), adopted in 1972, In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972), and substantially modified by amended Rule 3.210 on February 10, 1977, effective July 1, 1977, 343 So.2d 1247 (Fla. 1977), provided as follows:

> RULE 3.210. Insanity
>
> (a) At Time of Trial.
>
> (5) If at any time after such commitment the Court decides, after hearing, (1) that there is no substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future or (2) that no progress is being made toward that goal, it shall enter an order accordingly and shall find and adjudge the defendant not guilty by reason of insanity and forthwith direct the institution of civil proceedings for the commitment of the defendant. The defendant shall remain in custody until determination of the civil proceedings.

Florida Rule of Criminal Procedure 3.217(b), adopted July 18, 1980, effective July 1, 1980, 389 So.2d 610 (Fla. 1980), provides as follows:

> RULE 3.217 Judgment of Not Guilty by Reason of Insanity: Disposition of Defendant
>
> (b) When a person tried for an offense shall be acquitted for the cause of insanity, if the court shall then determine that the defendant presently meets the criteria set forth by law, the court shall commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization or placement, or shall order that he receive outpatient treatment at any other appropriate facility or service on an outpatient basis, or shall discharge the defendant.

STATEMENT OF THE CASE*

Petitioner's Statement of the Case contains a number of inaccuracies and mischaracterizations of the record.**

* References to the various portions of the record on appeal will be referred to in accordance with the citation form set forth in footnote on page 2 of the Petition for Certiorari.

**For example, Petitioner's formulation of the Question Presented contains no less than three blatant and misleading errors. The Petitioner refers to Respondent's plea of guilty (Petition for Certiorari, p. i), whereas, in fact, as the court below found, "[h]e entered a nolo plea reserving the right of appeal to this court." 390 So.2d at 96. Petitioner's Question also asserts that Respondent "was at all times civilly committable . . . ." (Petition for Certiorari, p. i) Although Respondent was repeatedly examined for competency to stand trial and adjudications entered on this issue, the trial court never considered the issue of whether he was civilly committable. Petitioner's Question also asserts that the Respondent "was not shown to be prejudiced in his ability to defend as a result of the length of the delay . . . ." (Petition for Certiorari, p. i) In fact, Respondent was seriously prejudiced by the almost eight year delay, as described in detail in Respondent's brief below. (Brief of Appellant, pp. 43-49) He was subjected to oppressive pretrial detention of the worst possible kind, having been held in a barren safety cell at the Dade County Jail, which Respondent himself referred to as "the hole" (R. 174A), and in the notorious forensic wards of South Florida State Hospital and Florida State Hospital at Chattahoochee, facilities described by the Clinical Director of South Florida State Hospital as possessing insufficient staff to involve the patients in any type of psychotherapy (TR. 179). Moreover, court interference with needed treatment hindered Respondent's progress toward mental health and resulted in substantial deterioration of his condition (TR. 110-36, 142-48, 157-60, 178), and possibly resulted in permanent impairment. (TR. 178) Respondent also experienced considerably anxiety and concern over his charges pending for almost an eight-year period, as well as over the practices he was subjected to. (R. 5, 9, 166, 215, TR. 231) Moreover, the lengthy delay hampered Respondent's ability to mount a factual defense as a result of the passage of time between initial statements given by the State's witnesses and the time of trial (R. 95, TR. 107, Petitioner's Supplemental Brief, p. 8, State of Florida ex rel. Garrett v. Morphonios, 356 So.2d 392 (Fla. 3d DCA 1978), as well as his ability to raise a legal insanity defense. (R. 95, TR. 107).

However, the existence of an independent and adequate state ground for the decision below renders unnecessary a complete review at this point of the extremely detailed and lengthy factual record in this case. Respondent will, therefore, simply note his objection to Petitioner's characterization of the opinion below as "based exclusively on Jackson v. Indiana . . . ." (Petition for Certiorari, p. 17) The opinion below is somewhat ambiguous. Although it quotes from Jackson, it also contains language which, given the factual and legal context of this case, strongly suggests the likelihood that the court below's decision was based not on federal constitutional principles, but on former Florida Rule of Criminal Procedure 3.210(a)(5). This state rule, repealed in 1977, mandated the relief provided by the court below (discharge unless the state shall elect to commence civil proceedings).

That Jackson v. Indiana may not have been the basis for the decision of the court below is hinted at by Petitioner's expression of surprise concerning the lower court decision. (Petition for Certiorari, p. 17) Petitioner correctly points out that the briefs filed in the lower court by both sides "exclusively addressed Garrett's speedy trial claims. The decision of Jackson v. Indiana, 406 U.S. 715 (1972), was not relied on at all in these briefs." (Petition for Certiorari, p. 17)

A close reading of the somewhat ambiguous lower court opinion reveals the reason for Petitioner's surprise. It is true that the parties only briefed the speedy trial claims and that the court below did not address them. However, although the court below quoted from Jackson, and stated that Respondent had "been held more

than a 'reasonable period' without the requisite determination of the likelihood of his eventual ability to stand trial," 390 So.2d at 97, the court's reversal and discharge of Respondent is not based on Jackson. Rather, it is based on the lower court's holding that "since it appears that the trial court was of the opinion that Garrett was per se incompetent while under the influence of his medication--a belief not legally untenable until 1977 (when Section 918.15)(4)(a), supra, was passed), it is clear that had the court held the hearing mandated by Jackson, at any time prior to 1977, it would necessarily have found Garrett permanently incompetent." 390 So.2d at 97 (emphasis added). Although the court below did not refer to it, former Florida Rule of Criminal Procedure 3.210(a)(5), in effect from 1972 to 1977, required that a trial court which found no substantial probability that the defendant would become mentally competent to stand trial within the foreseeable future, "shall enter an order accordingly and shall find and adjudge the defendant not guilty by reason of insanity and forthwith direct the instutution of civil proceedings for the commitment of the defendant."

Thus, the court below based its decision on the fact that under state law, as it existed in 1977, had the trial court held the hearing mandated by Jackson, it would have found the defendant not guilty by reason of insanity under Rule 3.210(a)(5). Although Respondent's brief in the court below did not rely on Rule 3.210(a)(5), in view of its revision, effective July 1, 1977, abolishing the not guilty by reason of insanity adjudication for those found permanently incompetent, Rule 3.210(a)(5) had been raised by Respondent at the

trial court no less than six separate times during the years 1973 to 1977. The Petition for Certiorari itself mentions five of these instances--defense attempts to have Respondent declared not guilty by reason of insanity under Rule 3.210(a)(5) on April 12, 1973 (Petition for certiorari, p. 8), June 26, 1974 (id. at 9), December 3, 1975 (id. at 12), October of 1976 (id. at 13), and March 2, 1977 (id. at 14). These six instances were well known to the court below, as they had been pointed out in the various briefs filed therein. (Brief of Appellant, pp. 12-13, 15, 18, 21, 22-25; Brief of Appellee, pp. 5, 7-8, 25-26; Reply Brief of Appellant, pp. 5-7). Thus, although Respondent did not brief the Rule 3.210(a)(5) issue in the court below, that court was well acquainted with Respondent's repeated attempts to raise that issue in the trial court and could certainly therefore have based its decision on this state law issue rather than deal with the constitutional speedy trial claim Respondent had pressed.

Petitioner's Motion for Rehearing in the court below itself recognized that the lower court's decision was based on the "failure of the trial court to hold a hearing as to the likelihood of Appellant's eventual ability to stand trial and the fact that it is apparent from the record that had such a hearing been held, the trial court would have necessarily found Appellant permanently incompetent." (Petition for Certiorari, p. App. 8) Petitioner argued on rehearing that this issue was improperly reached as it had not been raised as an issue in the case. (Id. at App. 8-9) This, of course, is purely a state law issue, which the court below, in denying rehearing, and the Supreme Court of Florida, in denying

review, resolved against Petitioner's contention.

We thus believe that the court below based its decision on state law, rather than on the constitutional dictates of Jackson. The language in the decision below quoted from Jackson (390 So.2d at 97) does not, as even Petitioner points out, require reversal and discharge; it only requires the institution of civil commitment proceedings or release. Former Florida Rule of Criminal Procedure 3.210(a)(5), when read in conjunction with present Florida Rule of Criminal Procedure 3.217(b), does, however, require initiation of commitment proceedings or discharge. Rule 3.210(a)(5) required an adjudication of not guilty by reason of insanity that would, of course, be inconsistent with Petitioner's nolo plea and would require its reversal. Had the trial court made a determination under Rule 3.210(a)(5) "at any time prior to 1977," 390 So.2d at 97, it would thus have adjudicated him not guilty by reason of insanity. However, in 1980, at the time of the court below's decision, Rule 3.210(a)(5) had been repealed. As a result, the court below could not have required that that Petitioner be adjudicated not guilty by reason of insanity in 1980. Nor did it do so in its opinion. It simply reversed his conviction and ordered the trial court to discharge him unless the state elected to commence civil proceedings. This is fully consistent with the way in which an individual adjudicated not guilty by reason of insanity would have been treated under Florida law in 1980 pursuant to Florida Rule of Criminal Procedure 3.217(b), requiring civil commitment or discharge. This analysis, although concededly not spelled out by the court below, is the only one consistent with the remedy provided, and thus

indicates that the decision of the court below was based on state law rather than on the constitutional dictates of Jackson v. Indiana.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE DECISION BELOW WAS BASED ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

This Court has consistently adhered to the principle that it will not reverse a state court judgment based upon an adequate and independent state ground, even though a federal question might be involved and perhaps wrongly decided. E.g., Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Murdock v. Memphis, 20 Wall. 590, 636 (1875). As we have contended in our Statement Of The Case, the decision below was based not on Jackson v. Indiana, as the Petitioner asserts, but rather on state rules of criminal procedure. Where, as here, adequate state grounds are asserted and appear reasonable, this Court has held that a "petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below." Durley v. Mayo, 351 U.S. 277, 281 (1956). Petitioner's burden of establishing jurisdiction is not met if "it appears that the judgment [below] might have rested upon a nonfederal ground . . . ." Id; Ellis v. Dixon, 349 U.S. 458, 459 (1955); Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

Not only is the decision of the court below, when properly analyzed, based on state law grounds, but even if it is based on both federal and state law grounds, it is clear that the relief provided under state law is sufficiently broad, without reference to the federal issue, to sustain the judgment of the court below.

The court below found that Respondent would have been found permanently incompetent had that issue been considered in 1977. Both Jackson and Florida Rule of Criminal Procedure 3.210(a)(5) independently required consideration of this issue, and the Florida rules, independent of Jackson, required the remedy provided by the court below. Thus, the decision below is based not only on a non-federal ground, but on one that is adequate to support the judgment. See Eustis v. Bolles, 150 U.S. 361, 370 (1893); Murdock v. Memphis, 20 Wall. 590, 636 (1875).

2. EVEN IF THE DECISION BELOW IS CONSTRUED TO REST SOLELY ON JACKSON v. INDIANA, DISMISSAL OF CHARGES ON OUTRAGEOUS FACTS SUCH AS THOSE PRESENTED HERE WOULD NOT CONFLICT WITH JACKSON OR WITH ANY OTHER DECISION OF THIS COURT.

If the decision below is construed to rest entirely on Jackson v. Indiana, 406 U.S. 715 (1972), certiorari should nevertheless be denied as dismissal of charges against an incompetent defendant on facts such as these would not present a conflict with Jackson or with any other decision of this Court. In Jackson, this Court explicitly recognized that in some cases due process will require dismissal of charges against an incompetent accused. 406 U.S. at 740. Although on the facts of Jackson, this Court declined to reach the defendant's argument that "fundamental fairness requires that the charges against him shall be dismissed," id. at 739, the Court noted that "Jackson's claim is a substantial one . . . ." The Court however, declined to decide the issue "at this time." Id. In so doing, however, the Court explicitly recognized that "[d]ismissal of charges against an incompetent accused" may, in appropriate cases, be justified either on speedy trial grounds or as a result of "the denial of due process inherent in holding

pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence." Id. at 740.

The facts of this rather unique case involve nearly an eight year period in which an incompetent accused was detained without regaining his competency due to the trial court, in concert with the prosecution, repeatedly and needlessly halting the medical treatment that was necessary to maintain Respondent's competence to stand trial. Such facts graphically present the due process problem referred to in Jackson. It therefore would not have been inconsistent with Jackson for the court below to dismiss Respondent's charges on these grounds.

In any event, the issue of whether due process may require dismissal of charges against an incompetent accused on outrageous facts as are here presented is not a sufficiently substantial issue to warrant this Court's review. The decision below turns upon its own unique facts, will effect no one other than Respondent, and involves a fact pattern--the application of a rule automatically barring from trial competent defendants who require ongoing psychotropic medication--that cannot reoccur in Florida as a result of statutory change adopted partially in response to the facts of this very case. Fla. Stat. § 918.15(4).

3. EVEN IF JACKSON v. INDIANA IS HELD NOT TO REQUIRE DISMISSAL OF CHARGES ON FACTS SUCH AS THESE, THE SAME RESULT WOULD BE REQUIRED UNDER THE SPEEDY TRIAL PROVISIONS OF THE FLORIDA RULE OF CRIMINAL PROCEDURE AND THE UNITED STATES CONSTITUTION.

The court below never reached Respondent's substantial contentions that his right to a speedy trial under the Florida Rules of Criminal Procedure and the Florida and the United States

Constitution was violated by the almost eight year delay between Respondent's arrest and his plea of nolo, specifically reserving his right to appeal on this basis. Thus, were this Court to conclude that the grounds relied on by the court below were improper, it would nonetheless have to consider and reject Respondent's speedy trial claims before reversing the decision below. Respondent will not here develop in detail his speedy trial contentions, which are extensively developed in the fifty page Brief of Appellant filed in the court below. We will, however, simply summarize the contentions to demonstrate that a substantial claim under Barker v. Wingo, 407 U.S. 514 (1972), is presented.

All but at most several months of this almost eight year inordinate delay is chargeable to the state. It resulted from a combination of prosecutorial and judicial action designed to frustrate Respondent's opportunity to face his charges by repeatedly halting the medical treatment--antipsychotic medication--that psychiatrists repeatedly had warned was necessary to maintain his competence to stand trial. It also resulted, in part, from judicial inaction in violation of the clear mandate of Florida law, from clerical error and neglect by a series of court clerks, jailers and hospital officials, and from a general failure of the prosecution to fulfill its duty to take affirmative action to return Respondent to trial as promptly as possible. This lengthy delay, objected to on many occasions by Respondent, resulted in pretrial incarceration of the most oppressive kind, exacerbated Respondent's mental illness, and impaired the possibility of his mounting either a factual defense or a defense based on legal insanity (which

focuses on his mental condition almost eight years before). In cases such as this involving incompetent defendants confined for lengthy periods, a number of courts have found constitutional speedy trial violations. E.g., Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957); United States v. Pardue, 354 F. Supp. 1377 (D. Conn. 1973).

CONCLUSION

For these reasons, the Petition for the Writ of Certiorari should be denied.

Respectively submitted,

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AFFIDAVIT OF MAILING AND SERVICE

BRUCE J. WINICK, a member of the bar of this Court, hereby certifies that a true and correct copy of the Brief in Opposition to Certiorari and Motion for Leave to Proceed In Forma Pauperis was mailed by depositing the same for mailing in a United States mailbox, with first-class postage prepaid, to the Clerk of this Court, and to ARTHUR JOEL BERGER, Assistant State Attorney, 6th Floor, 1351 Northwest 12th Street, Miami, Florida 33125, and to ANTHONY C. MUSTO, Assistant Attorney General, Department of Legal Affairs, 401 Northwest 2nd Avenue, Suite 820, Miami, Florida 33128, on this 7th day of August, 1981.

Bruce J. Winick

Bruce J. Winick

Sworn to before me this
7th day of August, 1981

Notary Public

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MARCH 20, 1984

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

AUG 10 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-53

THE STATE OF FLORIDA,

Petitioner,

v.

WILLIE ALLAN GARRETT,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, WILLIE ALLEN GARRETT, who is now held in Raiford Prison, Florida, asks leave to file the attached Brief in Opposition to Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Respondent has been permitted to proceed in forma pauperis at every stage of these proceedings and has had court-appointed counsel.

An unexecuted copy of Respondent's affidavit in support of this motion is attached hereto. Counsel for Respondent prepared and sent to Respondent a copy of this affidavit for his execution. However, because of delays in the mail, the executed copy has not as yet been returned to counsel. As a result, this Motion attaches an unexecuted copy, and counsel will submit the executed copy to the Clerk of this Court as soon as it is received.

Bruce J. Winick

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

THE STATE OF FLORIDA, Petitioner,

v.

WILLIE ALLEN GARRETT, Respondent

AFFIDAVIT

I, Willie Allen Garrett, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the relief granted by the District Court of Appeal of Florida, Third District, reversing my conviction and ordering the State of Florida to discharge me unless it shall elect to commence civil commitment proceedings within thirty days from the issuance of its mandate, which decision the Supreme Court of Florida decline to review.

_____
Willie Allen Garrett

Duly witnessed and sworn to before me,
a Notary Public, this _____ day of
August, 1981.

_____
Notary Public